IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of case

Criminal Appeal No.724 of 2001
(Old No. 1330/1984)

Date of decision: 29.6.2005

~~A.F.R. (Approved for Reporting)~~

Not approved for reporting

Date :-29.6.2005 Initial of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No.724 of 2001
{Old No. 1330/1984}

Virbhanu Singh S/o Kallu
R/o village Jaspur
Patti Gamari
District Uttarkashi .....Appellant

Versus

State .....Respondent

Date:- 29th June, 2005

Hon'ble J. C. S. Rawat, J.

1. This is a criminal appeal against the judgment and order dated 05.05.1984 passed by Sri V. N. Mehrotra, the then Sessions Judge, Uttarkashi in S.T. No.1/1983, whereby the appellant-Virbhanu Singh was convicted and sentenced to undergo R.I. for a period of one year under section 376 I.P.C. It was further directed that the appellant shall be sent to "Bal Sadan" Bareilly in order to serve the sentence.

2. Brief facts of the case are that the 'prosecutrix' was aged about 12 years and was studying in class VIth of a school situated in Rauthal. She was the resident of village Margaon, patti Gamari, Tehsil Dunad, District Uttarkashi. On 13.1.1982 the prosecutrix was returning from her school to her village and at about 3PM when she reached near the canal of village Jaspur, the appellant met her there. The appellant dragged the girl to a secluded place and tied her mouth with a scarf. He threw her down on the ground and committed rape upon her. When the prosecutrix reached her house, she narrated the whole incident to her maternal grandmother and elder sister. When her father-Dhaukaru Dass returned to her house in the night, she

also narrated the incident to her father. Thereafter, on the next day i.e. 14.1.1982 Dhaukaru Dass lodged the FIR (Ex.ka.1) at Uttarkashi. Thereafter, the police investigated the matter and the chargesheet was submitted by the court.

3. In order to prove its case, the prosecution has examined nine witnesses i.e. prosecutrix (P.W.1), Smt. Maheshwari (PW-2), Dhaukaru Dass (PW-3), Shiv Singh(PW-4), Dr. Usha Kiran Joshi (PW-5), Constable Rameshwar Prasad (PW-6), S.I.-B.S.Yadav(PW-7), M. L. Shilpkar-CMO (PW-8) and Chandra Pal Verma (PW-9). Thereafter, the statement of the accused-appellant was recorded under section 313 Cr.P.C. Accused pleaded not guilty to the offence charged. He has denied the allegations and alleged that he had been falsely implicated in this case.

4. On consideration of the entire evidence on record the learned Sessions Judge conviction the appellant and sentenced him to undergo for a period of one year under section 376 I.P.C.

5. Feeling aggrieved by the order of the Sessions Judge, the appellant has come up before this Court.

6. Heard Sri Lokendra Dobal learned counsel for the appellant and Sri Nandan Arya learned A.G.A. and perused the record carefully.

7. The learned counsel for the appellant did not dispute the propriety of the finding of the learned Sessions Judge in regard to the guilt of the appellant

who had been convicted for the offence punishable under section 376 I.P.C.

8. The only challenge has been made before this Court that the learned Sessions Judge held that the accused was about 16 years at the time of incident. Further, it has been held that the accused had also filed his school living certificate which shows that his date of birth was 10.1.1968. It has been held that the accused was 16 years as on 5.5.1984-the date of judgment. The incident took place on 13.1.1982. As such, it is clearly evidence that the age of the accused was 15 years at the time of incident. This fact had also been supported by the certificate given by the Chief Medical Officer on 7.3.1983, according to which his age was between 15 to 18 years.

9. The learned counsel for the appellant further contended that the learned Sessions Judge has erred in sentencing the appellant. The appellant should have been sent to the 'Approved School' as provided under the U.P. Children Act. Perusal of the record reveals that the learned Sessions Judge has held that the provisions of U.P. Children Act were not applicable to the District of Uttarkashi. These provisions were extended to District Tehri Garhwal vide notification No.627(PIII36/S/ W576(P-61) dated 20.6.1962. it is also on record that the district Uttarkashi was carved out from the district Tehri Garhwal vide notification dated 24.2.1960. As such, at the time of incident the provisions of U.P. Children Act were not applicable to the district Uttarkashi. However, the learned Sessions Judge after discussing the aspect of the case has held that the accused was an immature lad of about 14 years only

and a lenient view was taken in this regard. The accused was sentenced to undergo for a period of one year under section 376 I.P.C. The learned Sessions Judge instead of sending him to jail to serve the punishment he was sent to “Bal Sadan” Bareilly during the period of his sentence.

10. The learned counsel for the appellant contended that the appellant is entitled to the benefit of Juvenile Justice (Care & Protection of Children) Act 2000 since he was juvenile both on the date of occurrence and the date of his production before the court. The said occurrence took place on 13.1.1982 and he was produced before the Magistrate on the next date i.e. 14.1.1982. Section 2(k) of the Juvenile Justice (Care & Protection of Children) Act 2000 provides that “Juvenile” or “child” means a person who has not complete eighteenth year of age. The fact that on the date in question, the appellant had not completed eighteen years of age cannot be doubted as the learned Sessions Judge has also held that the appellant was an immature lad of about 14 years at the time of incident. As per the medical report dated 7.3.1983, which is indicated in the judgment, the age of the appellant was between 15 to 18 years. Even in the order of sentence recorded by the learned Sessions Judge, the age of the appellant was 16 years.

11. Section 20 provides for special provision in respect of pending cases. It provides that notwithstanding anything containing in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act came into force in that area shall be continued in that court as if the Act had not been

passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. Section 16 of the Juvenile Justice (Care & Protection of Children) Act 2000 provides that no juvenile shall be sentenced to death or life imprisonment, or committed to prison in default of payment of fine or in default of furnishing security. A juvenile, under the provisions of the Act, can be referred to the Juvenile Board for such orders to be passed by the Board as it thinks fit in terms of Section 15 of the Act. The Juvenile Justice (Care & Protection of Children) Act 2000 came into force on 1.4.2001. When the appeal filed by the appellant wa spending before this Court, the Act has been applied. Therefore, the appellant was entitled to the benefit of the provisions of Juvenile Justice (Care and Protection of Children) Act 2000. I am fortified with the view taken by the Hon'ble Supreme Court in **Upendra Kumar Vs. State of Bihar 2005 SCC(Cri) p/778.**

12. It has been held in **Bhoop Ram Vs. State of U.P. SCC 1989 (3) p/1:-**

> *"8. Since, the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in Jayendra Vs. State of U.P. 1981(4) SCC p/149, 1981 SCC(Cri)*

p/809 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed."

13. In view of the foregoing discussion, I am of the view that the appellant had not completed the age of eighteen years on the date of incident. However, the learned Sessions Judge has also held that the accused was an immature lad of about 14 years at the time of incident. The incident took place on 13.1.1982 and it would not be just and proper to refer the appellant to the Juvenile Board at such a long lapse of time. By now, the appellant would have attained the age of 36 years. In view of the foregoing discussions, the conviction recorded by the learned Sessions Judge is sustainable and the sentence under section 376 I.P.C. is liable to be quashed.

14. The conviction of appellant under section 376 IPC is sustained and the sentence awarded to the appellant is

quashed. The appeal is, therefore, party allowed. The judgment and order dated 5.5.1984 passed by the learned Sessions Judge, Uttarkashi in so far as the sentence imposed upon the appellant is quashed.

(J.C.S.RAWAT, J.)

Dated 29.06.2005

LSR